



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

August 22, 1995

Mr. Richard D. Monroe  
Deputy General Counsel  
Texas Department of Transportation  
125 E. 11th Street  
Austin, Texas 78701-2483

OR95-835

Dear Mr. Monroe:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 34653.

The Texas Department of Transportation (the "department") received a request for the department's "Logmile Data" for the test routes used in the department's evaluation of several bids and "all data used [by the department] for the evaluation of competing firms" in connection with these same bids. You claim that the requested information is excepted from disclosure under section 552.103(a) of the Government Code. You have submitted samples of the documents requested.<sup>1</sup>

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The department must meet both prongs of this test for information to be excepted under 552.103(a).

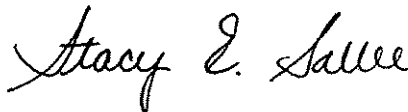
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<sup>1</sup>In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

This office has previously held that contested cases under the Administrative Procedure and Texas Register Act, now the Administrative Procedure Act, are "litigation" for purposes of section 552.103(a). Open Records Decision No. 588 (1991). The requestor states that he is in the process of "preparing formal documentation for submittal to the State Office of Administrative Hearings" which he planned to file on July 12, 1995, and outlines the problems he has with the department's award of the bid to a competitor. We conclude that in this instance litigation is reasonably anticipated. See Open Records Decision No. 555 (1990) (when preliminary steps toward litigation have been taken, litigation is reasonably anticipated). We also conclude that the documents submitted to this office for review are related to the anticipated litigation. Therefore, the department may withhold the requested information. We note that when the opposing party in the litigation has seen or had access to any of the information in these records, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee  
Assistant Attorney General  
Open Government Section

SES/RHS/rho

Ref.: ID# 34653

Enclosures: Submitted documents

cc: Mr. R.L. Lewis  
President  
Navstar Mapping Corporation  
7700 Merrybrook  
Austin, Texas 78731  
(w/o enclosures)